



New South Wales

Fair Trading Amendment Bill 2004

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Fair Trading Act 1987* as follows:

- (a) to expressly authorise the Commissioner for Fair Trading (called “the Director-General” in the Act) to disclose information to, and receive information from, fair trading agencies, law enforcement agencies and other relevant agencies,
- (b) to empower investigators, under the authority of a search warrant, to enter and search any place (which includes a vehicle) for evidence of a contravention of the Act and to seize anything that is connected with any such contravention,
- (c) to replace the current provisions that regulate pyramid selling with provisions that mirror those contained in the *Trade Practices Act 1974* of the Commonwealth,
- (d) to make other miscellaneous amendments of a minor or consequential nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Fair Trading Act 1987* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to other Acts in Schedule 2.

Schedule 1 Amendment of Fair Trading Act 1987

Exchange of information with other agencies

Schedule 1 [1] expressly authorises the Director-General to disclose information to, and receive information from, other fair trading agencies and law enforcement agencies in Australia and overseas as well as certain agencies that exercise functions with respect to matters affecting the interests of consumers. The information that may be the subject of an information sharing arrangement under proposed section 9A will be limited to certain matters (such as investigations, law enforcement or complaints) that relate to the functions of the Director-General or other agency concerned.

Powers of entry, search and seizure under search warrant

At present, section 19 of the Act empowers an investigator to enter any place or land where goods are manufactured, prepared or supplied (or where services are supplied or arranged) and exercise certain powers such as taking goods for which the investigator pays a fair price. Section 19 also presently empowers an investigator, with the written authority of the Director-General, to enter certain premises and to inspect, and make copies of or take extracts from, documents evidencing conduct in contravention of the Act.

In addition to these existing powers of entry and inspection, **Schedule 1 [3]** will empower an investigator, under the authority of a search warrant, to enter and search any place (which will include a vehicle, vessel or aircraft for the purposes of the proposed section 19A) and seize anything that the investigator believes on reasonable grounds is connected with a contravention of a provision of the Act. Provision is made for the return of anything seized that is not required as evidence in proceedings for an offence.

Schedule 1 [2] is a consequential amendment that requires an investigator who is exercising powers under a search warrant issued under proposed section 19A to show his or her identification as an investigator if required to do so.

Prohibition on pyramid selling

Pyramid selling is a sales scheme that concentrates on recruiting new sales people into the scheme rather than selling products. At present, section 56 of the Act prohibits certain pyramid selling schemes. The *Trade Practices Act 1974* of the Commonwealth was amended in 2002 to include new provisions in relation to pyramid selling.

Schedule 1 [4] omits section 56, and in its place, **Schedule 1 [5]** inserts proposed Part 5D which contains provisions that mirror the Commonwealth's new pyramid selling provisions. **Schedule 1 [6] and [7]** make consequential amendments.

Miscellaneous amendments

Schedule 1 [8] restates the defences provided by section 71 (1) (a) and (b) of the Act to exclude certain information (namely, information in the nature of legal advice on the legal consequences of conduct) from the type of information to which the defence applies. As a result of the amendment, which is in keeping with recent amendments to the corresponding provisions of the *Trade Practices Act 1974* of the Commonwealth, the defence will be restricted to a reasonable mistake of fact, including a mistake of fact (not law) caused by reasonable reliance on information supplied by another person. **Schedule 1 [9]** is a consequential amendment.

Schedule 1 [10] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 1 [11] inserts a power to make savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts

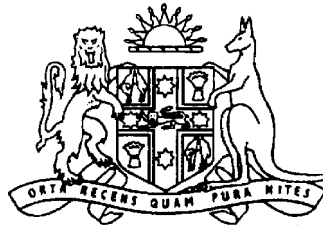
Schedule 2 amends certain legislation in connection with the search warrant power to be inserted by Schedule 1 [3] to the proposed Act.

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No. , 2004

A Bill for

An Act to amend the *Fair Trading Act 1987* to make further provision with respect to the powers of investigators, the exchange of information and the regulation of pyramid selling schemes; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Fair Trading Amendment Act 2004*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Fair Trading Act 1987 No 68

The *Fair Trading Act 1987* is amended as set out in Schedule 1.

4 Amendment of other Acts

Each Act specified in Schedule 2 is amended as set out in that Schedule.

Schedule 1 Amendment of Fair Trading Act 1987

(Section 3)

[1] Section 9A

Insert after section 9:

9A Exchange of information

- (1) The Director-General may enter into an arrangement (an *information sharing arrangement*) with a relevant agency for the purposes of sharing or exchanging information held by the Director-General and the agency.
- (2) The information to which an information sharing arrangement may relate is limited to the following:
 - (a) information concerning investigations, law enforcement, assessment of complaints, licensing or disciplinary matters,
 - (b) probity assessments and reference checks concerning persons who provide, or propose to provide, goods or services to consumers,
 - (c) any other information affecting the interests of consumers.
- (3) Under an information sharing arrangement, the Director-General and the relevant agency are, despite any other Act or law of the State, authorised:
 - (a) to request and receive information held by the other party to the arrangement, and
 - (b) to disclose information to the other party,but only to the extent that the information is reasonably necessary to assist in the exercise of functions under this Act (or any other Act administered by the Minister for Fair Trading, whether solely or jointly with another Minister) or the functions of the relevant agency concerned.
- (4) The Director-General may also (whether as part of an information sharing arrangement or otherwise):
 - (a) refer any matter (including any complaint) with respect to fair trading or that affects the interests of consumers to a fair trading agency or law enforcement agency, and
 - (b) receive any such matter from a fair trading agency or law enforcement agency, and

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- (c) conduct a joint investigation into any such matter with a fair trading agency or law enforcement agency. 1
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- (5) Any such fair trading agency or law enforcement agency is, despite any other Act or law of the State, authorised to refer such a matter to the Director-General or to conduct an investigation into the matter jointly with the Director-General. 3
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- (6) This section does not limit: 8
- (a) the functions that may be exercised by the Director-General under section 9, or 9
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- (b) the operation of any other Act under which a relevant agency is authorised or required to disclose information to another person or body. 11
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- (7) In this section: 14
- fair trading agency*** means an agency of the State, or of the Commonwealth, another State or Territory or an overseas jurisdiction, that exercises functions under an enactment with respect to fair trading. 15
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- law enforcement agency*** means: 19
- (a) NSW Police or the police force of another State or Territory or of an overseas jurisdiction, or 20
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- (b) the Australian Federal Police, or 22
- (c) the New South Wales Crime Commission, or 23
- (d) the Australian Crime Commission, or 24
- (e) any other authority or person responsible for the investigation or prosecution of offences against the laws of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction. 25
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- relevant agency*** means: 29
- (a) a fair trading agency, or 30
- (b) a law enforcement agency, or 31
- (c) any other agency of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction, or 32
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- (d) any other person or body that exercises functions, in the public interest, that involve protecting the interests of consumers. 34
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[2] Section 18 Office and identification of investigator	1
Insert “, 19A” after “section 19” in section 18 (2).	2
[3] Section 19A	3
Insert after section 19:	4
19A Powers of search and seizure under search warrant	5
(1) In this section:	6
<i>authorised justice</i> means an authorised justice within the	7
meaning of the <i>Search Warrants Act 1985</i> .	8
<i>place</i> includes a vehicle, vessel or aircraft.	9
(2) An investigator may apply to an authorised justice for the	10
issue of a search warrant if the investigator believes on	11
reasonable grounds that there is evidence of a contravention	12
of a provision of this Act on any place or land.	13
(3) An authorised justice to whom such an application is made	14
may, if satisfied that there are reasonable grounds for doing	15
so, issue a search warrant authorising any investigator:	16
(a) to enter the place or land specified in the warrant, and	17
(b) to search for evidence of a contravention of a provision	18
of this Act, and	19
(c) to exercise the powers of an investigator under	20
subsection (4).	21
(4) An investigator executing a search warrant issued under this	22
section may:	23
(a) examine anything (whether or not specified in the	24
warrant) that the investigator believes on reasonable	25
grounds may provide evidence of a contravention of a	26
provision of this Act, and	27
(b) seize anything (whether or not specified in the warrant)	28
that the investigator believes on reasonable grounds is	29
connected with a contravention of a provision of this	30
Act.	31
(5) The power to seize anything that is connected with a	32
contravention of a provision of this Act includes a power to	33
seize anything that will provide evidence of the	34
contravention.	35

(6)	Anything seized by an investigator under the authority of a search warrant issued under this section must be returned to the person who had lawful possession of the thing before it was seized if its retention as evidence in proceedings for an offence against this or any other Act is not required.	1 2 3 4 5
(7)	Part 3 of the <i>Search Warrants Act 1985</i> applies to a search warrant issued under this section.	6 7
(8)	Nothing in this section limits any of the other functions that may be exercised by an investigator under this Division.	8 9
[4]	Section 56 Pyramid selling etc	10
	Omit the section.	11
[5]	Part 5D	12
	Insert after Part 5C:	13
	Part 5D Pyramid selling	14
60S	Definitions	15
	In this Part:	16
	<i>new participant</i> , in a pyramid selling scheme, includes a person who has applied, or been invited, to participate in the scheme.	17 18 19
	<i>participant</i> in a pyramid selling scheme means a person who participates in the scheme.	20 21
	<i>participate</i> in a pyramid selling scheme means:	22
	(a) establish or promote the scheme (whether alone or together with another person), or	23 24
	(b) take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or promotes the scheme, or otherwise takes part in the scheme).	25 26 27 28

payment, to a person or received by a person, means:

- (a) the provision of a financial or non-financial benefit to or for the benefit of the person, or
- (b) the provision of a financial or non-financial benefit partly to or for the benefit of the person, and partly to or for the benefit of someone else.

pyramid selling scheme—see section 60T.

60T Meaning of “pyramid selling scheme”

- (1) For the purposes of this Part, a *pyramid selling scheme* is a scheme that has both of the following characteristics:
 - (a) to take part in the scheme, some or all new participants must make a payment (a *participation payment*) to another participant or participants in the scheme,
 - (b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (a *recruitment payment*) in relation to the introduction to the scheme of further new participants.
- (2) A scheme may be a pyramid selling scheme:
 - (a) no matter who holds out to new participants the prospect of entitlement to recruitment payments, and
 - (b) no matter who is to make recruitment payments to new participants, and
 - (c) no matter who is to make introductions to the scheme of further new participants.
- (3) A scheme may be a pyramid selling scheme even if it has any or all of the following characteristics:
 - (a) the participation payments may (or must) be made after the new participants begin to take part in the scheme,
 - (b) making a participation payment is not the only requirement for taking part in the scheme,
 - (c) the holding out of the prospect of entitlement to recruitment payments does not give any new participant a legally enforceable right,
 - (d) arrangements for the scheme are not recorded in writing (whether entirely or partly),

- (e) the scheme involves the marketing of goods or services (or both). 1
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 - (4) In deciding whether a scheme that involves the marketing of goods or services (or both) is a pyramid selling scheme, a court may have regard to the following matters in working out whether participation payments under the scheme are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments: 3
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 - (a) the extent to which the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme (as assessed, if appropriate, by reference to the price of comparable goods or services available elsewhere), 9
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 - (b) the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods and services by comparison with the emphasis given to their entitlement to recruitment payments. 15
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 - (5) Subsection (4) does not limit the matters to which the court may have regard in deciding whether participation payments are entirely or substantially induced by the prospect held out to new participants of entitlement to recruitment payments. 19
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- 60U Prohibition on participating in pyramid selling scheme** 23
- (1) A person must not participate in a pyramid selling scheme. 24
 - (2) A person must not induce, or attempt to induce, a person to participate in a pyramid selling scheme. 25
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- [6] Sections 62 (6), 65 (1) (a), 66 (1) (a) (i), 67, 71 (1) and 72 (1)–(4)** 27
- Insert “, 5D” after “5C” wherever occurring. 28
- [7] Sections 68 (1) and 69** 29
- Omit “or 5C” wherever occurring. Insert instead “, 5C or 5D”. 30

[8] Section 71 Defences	1
Omit section 71 (1) (a) and (b). Insert instead:	2
(a) that the contravention in respect of which the proceedings were instituted was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person, or	3 4 5 6 7
[9] Section 71 (2)	8
Omit “(b) and (c)”.	9
[10] Schedule 5 Savings and transitional provisions	10
Insert after clause 11D:	11
11E Fair Trading Amendment Act 2004	12
(1) In this clause, <i>amending Act</i> means the <i>Fair Trading Amendment Act 2004</i> .	13 14
(2) Part 5D, as inserted by the amending Act, applies only to conduct engaged in after the commencement of that Part.	15 16
(3) Section 71 (1) (a), as substituted by the amending Act, applies only in relation to a contravention that occurs after the commencement of that amendment.	17 18 19
[11] Schedule 5, clause 12 (1)	20
Insert at the end of the subclause:	21
<i>Fair Trading Amendment Act 2004</i>	22

Schedule 2 Amendment of other Acts	1
(Section 4)	2
2.1 Law Enforcement (Powers and Responsibilities) Act 2002 No 103	3
[1] Schedule 2 Search warrants under other Acts	5
Insert in alphabetical order:	6
<i>Fair Trading Act 1987</i> , section 19A	7
[2] Schedule 4 Amendments of other Acts and instrument	8
Insert after Schedule 4.33:	9
4.33A Fair Trading Act 1987 No 68	10
[1] Section 19A Powers of search and seizure under search warrant	11
Omit the definition of <i>authorised justice</i> from section 19A (1).	13
Insert instead:	14
<i>authorised officer</i> has the same meaning as in the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> .	15
[2] Section 19A (2) and (3)	17
Omit “authorised justice” wherever occurring.	18
Insert instead “authorised officer”.	19
[3] Section 19A (7)	20
Omit “Part 3 of the <i>Search Warrants Act 1985</i> ”.	21
Insert instead “Division 4 of Part 5 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> ”.	22
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2.2 Search Warrants Act 1985 No 37

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Section 10 Definitions

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Insert in alphabetical order of Acts in the definition of *search warrant*:
section 19A of the *Fair Trading Act 1987*,

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